

reverses and remands, Mr. Kobs would be able to conduct, in the very least, further discovery regarding the extent and nature of UWIC's conflict—which Respondent does not dispute.⁷ This evidence, for example, may lead the district court to lessen its reliance on the medical opinions of physicians hired by UWIC.

Furthermore, it is premature to speculate what evidence may be admissible at trial on remand. When an ERISA administrator is conflicted, the rationale for the judge relying solely on the written administrative record and not second-guessing the administrator is diminished or absent. In *Locher v. UNUM Life Ins. Co of Am.*, 389 F.3d 288 (2d Cir. 2004), for example, the Second Circuit examined one of its earlier decisions admitting evidence outside of the “administrative record.” *Id.* at 290-91 (citing *DeFelice v. American International Life Assurance Co. of New York*, 112 F.3d 61 (2d Cir. 1997)). Although the admission of evidence in *DeFelice* was not based solely on an inherent conflict, the *Locher* court stated “that it may be possible, in unforeseen circumstances, for good cause [sufficient to justify the admission of evidence outside the administrative record] to rest entirely on the existence of a conflicted administrator.” *Id.* at 296. See also *id.* at 293 (“When an administrator is conflicted . . . plaintiffs are utterly helpless against the whim of its interpretation of the facts, and the fairness of the ERISA appeals process cannot be established using only the record before the administrator.”) (citations, internal quotation marks, and brackets omitted). In this instance, Petitioner would seek to introduce evidence such as the Social Security Administration decision in his favor and

⁷ Indeed, in the very case cited by UWIC for the proposition that “review is based only on the administrative record,” Opp. 27-28, the First Circuit noted that a typical exception exists where “a claim of personal bias by a plan administrator” is asserted. *Orndorff v. Paul Revere Life Ins. Co.*, 404 F.3d 510, 520 (1st Cir.), cert. denied, 2005 WL 2493925, 74 U.S.L.W. 3108 (Oct. 11, 2005).

the fact of the foreclosure on his home and repossession of his car to rebut statements questioning his credibility. Pet. 5, 7 n.4. Thus, what the full scope of evidence at trial would be in this case cannot be predicted without knowing the substance of a decision by this Court.

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For the foregoing reasons and those stated in the petition and in the amicus brief of Legal Services for the Elderly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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